Manage a summary dismissal

Overview

It is essential that the exit interview be well-planned, conducted properly and that extensive notes are taken. This will ensure that all areas are covered for the exiting employee and that the likelihood for a dispute later on is severely diminished. Information gathered in the exit interview can also be used as feedback on how the organisation can improve its processes and procedures. This resource demonstrates how to plan and conduct an exit interview and how feedback can be used and evaluated.

Key terms

Dismissal
Dismissal occurs when the employment contract of a worker is terminated by management.

Serious misconduct
Conduct of such a nature that it would be unreasonable to expect the employer to continue with the employment during the notice period that would otherwise be required.

Summary dismissal
When the decision to dismiss is taken ‘on the spot’, it is described as summary dismissal.

Unfair dismissal
Unfair dismissal occurs when, after being summarily dismissed from a job, an employee is subsequently found by a court or tribunal to have not been, according to the terms of their employment contract, rightfully subject to dismissal.
Grounds for a summary dismissal

An organisation must have a valid reason to dismiss an employee, and the dismissal must not be ‘harsh, unjust or unreasonable’. Each of these factors is carefully considered in appeals against termination and in such cases, proof of a careful process is required from the organisation. Summary dismissal is generally used only when an employee’s conduct is characterised as being **gross**, **serious** and **wilful misconduct**. This conduct must really evince an intention by the employee not to be bound by the contract of employment any longer.

Common reasons that are used for summary dismissal include:

1. Conduct that threatens someone’s health & safety
2. Conduct that threatens the organisation’s reputation, viability or profitability.

Examples might be (depending on circumstances)

- Gross insubordination
- Abusive language
- Threatening behaviour
- Violence
- Obscenity
- Sexual harassment
- Sleeping on the job
- Gross dishonesty
- Drunkenness or drug taking
- Serious and wilful disobedience
- Serious incompetence or neglect of duty
- Serious breach of confidentiality or good faith
- Criminal offences

Think

**Have you ever been involved in, witnessed, or even heard about a summary dismissal?** What happened? Was it justified?
Harsh, just or unreasonable

Your organisation’s reasons for firing an employee wouldn’t be valid if, having taken into account all the circumstances of the case (including the employee’s capacity and conduct), the dismissal is harsh, unjust or unreasonable.

So before you terminate an employment contract, be sure you have heard, and fairly considered, the employee’s reasons for their behaviour and given them an opportunity to reply to any charges made against them.

In the case of a dispute, the Federal Court wants proof of:

- **substantive fairness** - there needs to be facts to substantiate or prove the employer’s case and justify the dismissal
- **procedural fairness** – this means:
  - providing the employee with written warnings
  - conducting a proper investigation
  - giving the employee an opportunity to be heard
  - providing written notice of the termination.

Evidence and fairness go hand-in-hand. The employee’s manager should keep diary notes of misconduct and written records of warnings. Any interviews or investigative reports should also be documented.

Before issuing a summary dismissal

Procedures for warnings or termination interviews must be carefully spelled-out and published for employees and managers. The organisation's responsibilities in regards to summary dismissal should include the following:

- When terminating an employee, pre-warn the employee about the termination interview or meeting.
- The reason for the meeting should be explained.
- The employee must be advised that they may have a representative or a witness at the meeting / investigation.
- The employee must be given time to prepare for the meeting.
- The employer should conduct a full, objective investigation into the misconduct (including witnesses, statements, etc.)
- The employer should show the employee any evidence they have.
- The employee must be asked for an explanation and given a full opportunity to do so.
• The employer should summarise / paraphrase what was said by the employee and should ask the employee for solutions to the situation

• The employer should consider the employee's responses and take these into consideration before taking any action. Bias and pre-judging should not be evident in this process.

• The minutes of the meeting, or notes, should be recorded and filed.

• The employer should consider alternatives regarding disciplinary action

• The employer must provide a written notice of termination with the reasons for termination to the employee.

• The employer must provide written final payment advice to the employee.

Often dismissals are overturned on appeal because some of these steps have been missed. But there are other examples of failure to ensure procedural fairness. For example, terminations have also been overturned because the organisation has:

• failed to thoroughly investigate allegations of misconduct.

• failed to apply its own policies and procedures for termination.

• deliberately misled an employee about job security.

Procedures to follow if the termination is not serious enough for summary dismissal

Less gross, serious and/or wilful examples of misconduct or poor performance may not warrant summary dismissal. Each incident of poor performance or unacceptable performance must be investigated thoroughly. This investigation may include interviewing those making allegations, interviewing witnesses, taking statements and interviewing the ‘complained of’ person.

Procedural Fairness and Natural Justice demand that the person complained of is made aware of the allegations. They must have an opportunity to answer the allegations and they may have a support person or an advocate present with them at time of interview. They must not be pre-judged by the decision makers, and objectivity, respect and consideration must be displayed at all times

Based on all the information in all the circumstances an appropriate sanction may be applied. When warranted ‘Warnings’ should follow from the investigation, preferably in writing, and then delivered to the employee.
Check your award but generally 3 ‘Warnings’ are issued. The 3rd Warning letter must state that employment is in jeopardy if there are further examples of unacceptable performance, etc. Warning letters must describe the unacceptable performance etc, the standards expected, the support offered and time to rectify issues. Upon the 4th occurrence an investigation must still follow before dismissal can occur.

At the end of the proceedings, a written letter of dismissal with reasons for dismissal must be provided and all final payments must be made upon termination with a written advice as to make-up of payment.

Unacceptable reasons for termination

The *Workplace Relations Act* sets out a number of reasons, which cannot be used as grounds for termination. They include:

- race
- colour
- gender
- age
- physical or mental disability
- marital status
- religion
- family responsibilities
- temporary absence as a result of sickness
- non-membership of a union, or union membership
- participation in trade union activity
- seeking public office
- filing of a complaint.

This is not an all-inclusive list—there are other reasons that cannot be used as grounds for termination.

When planning to terminate an employee (or a number of employees), you must be careful not to fall foul of the unfair dismissal rules. As discussed above, employees are protected by the principle of a ‘fair go’ all round.

**Think**

*Can you think of other reasons that could NOT be used for dismissal?*
Fair dismissal

When is dismissal fair? There are a variety of legitimate reasons why an employee’s services might be terminated. An employer might dismiss an employee who is:

- not appropriately skilled
- not appropriately motivated
- unreliable or exhibiting other forms of unhelpful conduct (e.g., not performing their duties in line with reasonable instructions).

It may, however, be the fault of the organisation that the employee is this way. If it’s the organisation that’s at fault, then the dismissal will not be fair.

An employee might also be dismissed because the position they occupy is no longer needed by the business (e.g., the position is redundant).